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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 329

DISTRICT COURT OF CREEK COUNTY, OKLAHOMA, and
HONORABLE KENNETH HUGHES,
the Judge Thereof,
Petitioners,

VERSUS

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

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August, 1956.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 5-8780

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In the

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VERSUS

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Oklahoma, entered in the above-entitled case on May 22, 1956.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Oklahoma, printed in Appendix B hereto, *infra*, p. viii, is reported at 298 P.2d 427.

JURISDICTION

The order of the Supreme Court of Oklahoma, directing that the present respondent's application for a writ of mandamus be granted, was entered on April 3, 1956. On May 3, 1956, within the period permitted by state practice, a petition for rehearing was filed. This petition was denied on May 22, 1956. See Appendix B hereto, at p. xiv.

This petition is filed within ninety days from the final judgment of the Supreme Court of Oklahoma. Jurisdiction of this Court to review the judgment is invoked under Title 28, United States Code, Sections 1257(3) and 2101(c).

QUESTIONS PRESENTED

1. Is the application of the doctrine of *forum non conveniens* by state courts in Federal Employers' Liability Act cases governed by a single federal standard?

2. Under what circumstances is dismissal of a Federal Employers' Liability Act action on grounds of *forum non conveniens* proper?

3. Can a state appellate court properly order dismissal, on grounds of *forum non conveniens*, a FELA action where the plaintiff administrator is a resident of the *forum* state, the defendant railroad has tracks there, the fatal accident occurred in an immediately adjoining state, there is no showing that suit at the *forum* will congest the docket of that court or inconvenience the defendant, and the trial judge has denied the motion to dismiss?

STATUTORY PROVISIONS INVOLVED

The tort action which gave rise to the mandamus proceedings for which review is sought here was brought pursuant to the Federal Employers' Liability Act, Title 45, United States Code, Sections 51-60. The following provisions of that statute are pertinent here.

"§ 51. *Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.*

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment * * *."

"§ 56. *Actions; limitations; concurrent jurisdiction of courts*

"No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

"Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

STATEMENT

On July 5, 1955, Vernon F. Adair, a brakeman for the respondent railroad, was killed at Cardinnias, New Mexico, in a collision between two trains of Respondent (R. 72-73). He was survived by his wife and seven children (R. 73-74). At the time of his death Adair and his family resided in Clovis, New Mexico (R. 92).

On July 18, 1955, Joe Moore, a resident of Creek County, Oklahoma, was appointed administrator of the estate of Vernon Adair by the County Court of Creek County, Oklahoma (R. 74). On that same date Moore, through his attorneys, brought suit under the Federal Employers' Liability Act in the District Court of Creek County, Oklahoma, against the respondent railroad, demanding damages for the death of Vernon F. Adair (R. 71-78).

On August 15, 1955, respondent moved to dismiss Moore's action "upon the principle of *forum non conveniens*" (R. 92). One of Moore's attorneys filed a detailed factual affidavit in opposition to this motion (R. 79-87). The motion came on for hearing November 28, 1955. The trial court denied the motion on the following grounds: (1) that the plaintiff was a local resident; (2) that the motion to dismiss failed to make sufficient showing of incon-

venience by trial of the action in that court; (3) that the docket of the court was not crowded; and (4) that the court was not persuaded trial of the suit would actually require all the witnesses listed in the motion to dismiss (R. 88-90). The court entered an order denying the motion (R. 99).

Thereupon respondent, on December 8, 1955, applied to the Supreme Court of Oklahoma for writs of mandamus and prohibition compelling the Creek County Court to dismiss the suit (R. 1). Petitioners entered an answer to this application (R. 8) supported by an affidavit of one of their attorneys (R. 13). For the convenience of this Court the application and answer in the Supreme Court of Oklahoma are reprinted as Appendix A to this petition, *infra*, p. vi. On April 3, 1956, the Supreme Court of Oklahoma entered an opinion and order directing that the writ of mandamus be granted (R. 104). The present petitioners, on May 3, 1956, made a timely application for rehearing (R. 115), which application was denied on May 22 (R. 123). On June 18, 1956. the Oklahoma Supreme Court ordered that its mandate issue but that enforcement of it be stayed pending determination by this Court of the present petition (R. 125).

REASONS FOR GRANTING THE WRIT

I. The proper application of the doctrine of *forum non conveniens* in Federal Employers' Liability Act cases raises a question of importance in the administration of that act.

Six years ago this Court held that the states "should be freed to decide the availability of the principle of *forum non conveniens* in these suits." *Missouri ex rel Southern*

Ry. Co. v. *Mayfield*, 340 U.S. 1, 5 (1950). A number of states have availed themselves of this privilege, and have determined to apply the doctrine of *forum non conveniens* in appropriate cases. But this Court, while passing on the question of power to apply *forum non conveniens* in FELA cases, has never spoken on the standard which is to be employed when this doctrine is used. The result of this lack of guidance to the courts which are charged with the day-to-day enforcement of the Act has been to leave such courts completely confused. Application of *forum non conveniens* has varied from state to state, from county to county, and even from judge to judge within a single district.

Even at its best, it can fairly be said of *forum non conveniens* that "as a *delaying* tactic it has few equals * * *." Green, *Jury Trial and Mr. Justice Black*, 65 Yale L. J. 482, 494 n. 36 (1956). This effect is greatly heightened when the lower courts are left without guides to the application of the doctrine. In the present unsatisfactory state of the authorities, a FELA plaintiff must expect to have to fight a lawsuit in order to determine where he can bring his lawsuit. The Legislature gave the FELA plaintiff a choice of *forums*, 45 U.S.C., Sec. 56, and has steadfastly refused to limit that choice. *Pope* v. *Atlantic Coast Line R. Co.*, 345 U.S. 379, 386-387 (1953). We do not here challenge the holding in the *Mayfield* case that the states should be free to resist imposition on their jurisdiction where the plaintiff's choice will produce injustice to the defendant, or unduly burden the court. But we do contend that the plaintiff is entitled to sufficient guidance so that he may make his choice with a fair confidence that it will be respected. Judicial administration is

not improved by adding to the work of busy courts a new class of litigation to determine where a lawsuit should be brought. And it does not conduce the fairness between the parties to free defendants from harassment if at the same time the door is open to expensive and delaying *forum non conveniens* proceeding. Perhaps it is a "rather fantastic fiction" to suppose that "a widow is harassing the Illinois Central Railroad." *Miles* v. *Illinois Cent. R. Co.*, 315 U.S. 698, 706 (1942). It is stark fact that a railroad can harass its maimed employees and their widows by making a FELA suit as lengthy and difficult as possible.

Of course there will be some differences of opinion, and thus some possibilities of harassment, so long as *forum non conveniens* is available at all in this class of cases. A doctrine which is essentially discretionary can never be applied with the precision of the theorems of Euclid. But neither need it be as elastic as the chancellor's foot.

The first question which the present case logically poses for review by this Court is whether application of *forum non conveniens* in the states is to be governed by a uniform federal standard, as are so many other important questions arising under FELA—See Notes, 37 Corn. L. Q. 799 (1952), 2 Stanf. L. Rev. 594 (1950)—or whether each state is free to decide for itself what substance it will give to the imposing Latin name. There are individual expressions in this Court's opinions which imply that a single standard is to govern. Thus:

> "By nothing that I have said do I mean to imply that every application by a State court of the doctrine of *forum non conveniens* in an action under the Federal Employers' Liability Act, or every cognate injunction,

> is necessarily proper, and that none may run afoul of that Act. By no technical or local procedural device can a State defeat the effective enforcement of a federal right."

Frankfurter, J., in *Pope* v. *Atlantic Coast Line R. Co.*, 345 U.S. 379, 394 (1953). And in another case reference was made to "the body of doctrine in Anglo-American law known as *forum non conveniens*, a doctrine which was certainly well developed at the time of the passage of the new Code." Clark, J., in *Norwood* v. *Kirkpatrick*, 349 U.S. 29, 34 (1955).

Further, the states seem to expect and to want a single standard to determine their application of *forum non conveniens*. So far as we know, every state which has held *forum non conveniens* available in its courts subsequent to the *Mayfield* decision in 1950 has adopted as its own the generalities this Court has enunciated, notably in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508-509 (1947), as to the meaning of the doctrine. This is specifically true in the case of Oklahoma. *St. Louis-San Francisco Ry. Co.* v. *Superior Court*, — Okla. —, 276 P.2d 772, 778 (1954).

Of course we do not mean to suggest that the only time a state can refuse to hear a FELA suit is when the case falls within the single standard of *forum non conveniens*. It can refuse to entertain such litigation whenever it has a "valid excuse." *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U.S. 377, 388 (1929); *Missouri ex rel Southern Ry. Co.* v. *Mayfield*, 340 U.S. 1, 5 (1950). But to date *forum non conveniens* is the only excuse which has been held valid by this Court. It is the excuse which the railroad claimed in the present case (R. 92), and it is the excuse on which the

Oklahoma Supreme Court specifically relied. See its opinion at p. viii, *infra*.

Railroad workmen are hampered in their attempts to obtain the remedy provided them by FELA because of the confusion in the state trial and appellate courts as to what *forum non conveniens* means, or even if there is one federal standard as to its meaning. In the interest of efficient administration of this important federal remedial statute, this Court should grant certiorari and define more clearly the proper application of *forum non conveniens* to this class of cases.

II. The court below applied the doctrine of *forum non conveniens* to the present case in a manner conflicting with decisions of this and other courts.

If the Court should decide that a single federal standard is to govern in the application of *forum non conveniens* to FELA cases, it will, of course, be necessary to define that standard. The generalities of *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508-509 (1947), are fine so far as they go, but they were not written with the peculiar problems of FELA litigation in mind. Such questions as the following continue to press for decision:

1. Whether the burden is on the defendant to demonstrate the inappropriateness of the *forum* or on the plaintiff to show that the *forum* is appropriate.
2. The extent to which plaintiff's choice of *forum* is a factor to be weighed in the balance.
3. Whether a plaintiff can ever be denied the privilege of suing in the state where he resides.

4. Whether the plaintiff administrator is the real party in interest in a death action, and to be regarded as such for purposes of *forum non conveniens*.

5. Whether a defendant railroad should be regarded as actually domiciled in every state in which it has tracks and operates trains.

6. Whether a more lenient rule should apply where plaintiff sues in a state adjoining that of his residence as contrasted with cases in which he goes to a *forum* far distant from his residence.

7. The weight to be given the trial court's determination of the appropriateness or inappropriateness of the *forum*.

Each of these questions is properly raised on the present record. As to each the decision of the Oklahoma Supreme Court is thought to be contrary to decisions of this and other courts, and to sound public policy.

(1) *Allocation of the burden.* A leading article says:

> "Furthermore, the burden in every case should be placed squarely on the defendant to make a detailed factual showing that the inconvenience to him of trial in the *forum* far outweighs the convenience to the plaintiff. Mere general allegations that witnesses and documents must be transported from a distant state should not suffice, since individuals and corporations who choose to do business in many states will probably be put to such inconvenience wherever suit is brought and that fact should not permit them to minimize their obligations."

Barrett, *The Doctrine of Forum Non Conveniens*, 35 Cal. L. Rev. 380, 421 (1947). This sound doctrine was ignored by the court below.

Many of the factors occasionally present in *forum non conveniens* proceedings have no application to this case, or, for that matter, to the great bulk of FELA cases. Thus there was no claim here that the jury might need to view the scene of the accident. There was no claim that trial in Oklahoma would require the courts of that state to pass on niceties of New Mexico law. There was no claim of any vital witness beyond the reach of Oklahoma subpoenas, who would not be available for trial in Oklahoma—every witness the defendant claimed might conceivably be necessary is employed by defendant and could be brought to Oklahoma by defendant. Compare *Mooney* v. *Denver & R. G. W. R. Co.*, 118 Utah 507, 221 P.2d 628, 649 (1950). In fact defendant presented only two reasons why the action should be dismissed: that trial in Oklahoma would be a burden on the court and congest its docket; and that it would cost defendant a little money to bring witnesses from New Mexico (R. 92-97). The trial court made a finding that the docket of his court was current and that trial of the case there could not inconvenience the court (R. 90, see also para. I[d] of his answer, p. v, *infra*). This factor was not mentioned by the Oklahoma Supreme Court. But that court did fully accept defendant's claim that it would cost defendant $5,000.00 more to defend the action in Oklahoma than in New Mexico (p. x, *infra*). This claim was challenged in both courts by plaintiff's attorneys and the trial judge, in his answer to the application for the writ, pointed out that defendant had failed to make any showing as to how the $5,000.00 figure, or any part of it, was calculated (p. vi, *infra*). Defendant listed in its motion to dismiss 15 persons having knowledge concerning the deceased's death

—but it never asserted that it would be necessary to call even one of these witnesses, nor did it give any indication of what testimony these witnesses might have that could be helpful. It did even less in this respect than the showing which was held insufficient in *Goodman* v. *Southern Ry. Co.*, 99 F. Supp. 852, 854-855 (S.D., N.Y., 1951). In the court below the railroad claimed that there would be fact issues as to contributory negligence, and that Adair had failed to compare all operation signals and orders with his engineer and fireman as required by the rules of the railroad. But the engineer and fireman, the only persons who could possibly have any knowledge on this issue, were both killed in the wreck (R. 82). Adair died in a head-on collision between two trains. Even the railroad has not had the temerity to suggest it will deny negligence. There are no living witnesses who could testify as to contributory negligence. There is no claim for conscious pain and suffering which would require testimony of persons who were at the scene.

It is plain that there are no witnesses to put defendant to additional expense by suit in Oklahoma, and that the court below erred in accepting defendant's claims of extra expense where this issue was sharply contested, a finding to the contrary had been made by the trial court, and no additional facts were presented to the Oklahoma Supreme Court justifying a different finding. The court erred in accepting *claims* of inconvenience without requiring the railroad to make a showing of said inconvenience. In effect the court put the burden on plaintiff to show that he had chosen a proper *forum*, as is evident from the statement in its opinion that:

"Plaintiff in this action is unable to suggest any valid reason why the action should be tried in this jurisdiction * * *."

(p. xii, *infra*). This Court should review this case, if only to make clear that, in accordance with the usual understanding of *forum non conveniens*, the party seeking dismissal carriers the heavy burden of showing the inappropriateness of the *forum*.

"* * * (M)ere inconvenience to the defendant in producing witnesses or records will not justify refusal. *The inconvenience must be serious enough to suggest a failure of justice if the suit is heard;* for example, where the cost of defending is out of proportion to the amount in litigation, or the witnesses are unavailable or the production of witnesses and records would seriously disrupt a business."

Barrett, *The Doctrine of Forum Non Conveniens*, 35 Cal. L. Rev. 380, 412 (1947) (Emphasis ours).

(2) *Plaintiff's choice.* Closely connected with the allocation of the burden of persuasion as to the appropriateness of the *forum* is the weight to be given to plaintiff's choice. The Oklahoma Supreme Court pays no heed to this factor, and indeed its statement, quoted above, that plaintiff was unable to suggest any reason why the action should be tried in Oklahoma implies a disregard of plaintiff's choice. Decisions of this and other courts, however, require that weight be given to plaintiff's choice.

"* * * (U)nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."

Gulf Oil Corp. v. *Gilbert*, 330 U.S. 501, 508 (1947). And see also *Ford Motor Co.* v. *Ryan*, 182 F.2d 329, 330 (2nd Cir., 1950), *certiorari denied*, 340 U.S. 851 (1950), where it was said:

> "* * * (T)he plaintiff's privilege, conferred by statute, of choosing the forum he selected is a factor to be considered as against the 'convenience' of the witnesses or what otherwise might be the balance of 'convenience' as between 'the parties'."

There are many reasons, difficult for a court to appraise, why a plaintiff may exercise his choice in one direction or another. In the present case plaintiff's attorney noted in an affidavit a belief that the influence of the defendant railroad is so stong and preponderant in the State of New Mexico that plaintiff might not have a fair trial there (R. 85). It cannot be expected that the Oklahoma Supreme Court, or this Court, will pass on whether that belief about New Mexico is true. It is enough that plaintiff in good faith believes it is true, and wishes therefore to avail himself of the privilege Congress conferred to bring his suit in another jurisdiction where he felt more confident of securing justice.

(3) *Effect of plaintiff's residence.* The plaintiff in the present case is a resident of Creek County, Oklahoma, and the suit ordered dismissed by the Oklahoma Supreme Court is one which he prosecuted in his own vicinage. The usual rule in *forum non conveniens* cases—as contrasted with the more liberal standard governing transfer under 28 U.S.C., Sec. 1404(a)—was summarized by three justices of this Court in their dissent in *Norwood* v. *Kirkpatrick*, 349 U.S. 29, 41 (1955):

> "Without detailing all the facts here involved, we note that one of the plaintiffs resided in the district where this suit was brought. Under the usual *forum non conveniens* approach, this would virtually suffice, in and of itself, to preclude a refusal to retain the case for trial. * * * Apparently but one jurisdiction stands squarely behind the proposition that a court may decline to hear a personal injury suit, brought by a *bona fide* resident, in order to spare the defendant inconvenience and expense. * * * This is the law in Scotland, a jurisdiction long noted for its distinctive doctrines in this area."

For holdings to this effect, see, *e.g.*, *Cressey* v. *Erie R. Co.*, 278 Mass. 284, 180 N.E. 160 (1932); *American Ry. Express Co.* v. *H. Rouw Co.*, 173 Ark. 810, 294 S.W. 401 (1927); *Gregonis* v. *Philadelphia & R. C. & I. Co.*, 235 N.Y. 152, 139 N.E. 223 (1923); see *Mooney* v. *Denver & R. G. W. R. Co.*, 118 Utah 507, 221 P.2d 628, 646 (1950).

The decision below, ordering dismissal of a suit brought by a resident plaintiff, conflicts with the decisions cited and is probably not in accord with decisions of this Court.

(4) *Administrator as real party in interest.* The effect of the decisions cited in the preceding section was sought to be avoided by the defendant and the court below on the ground that here the plaintiff is an administrator. In its application for a writ of mandamus the railroad asserted that "the real parties in interest in said action are the surviving wife and children of the deceased, all of whom are residents of the State of New Mexico and that the petition filed by the plaintiff administrator shows on its face that such nonresidents are the real parties in interest and that this suit is brought for their benefit" (p. ii, *infra*). In its

brief in the court below the railroad said that the claim that the administrator is the real party in interest was made "with tongue in cheek" (Pet. Br. 33). And, though the opinion is somewhat cloudy, the Oklahoma Supreme Court seems to say that "for purposes other than a strict determination of jurisdiction based on diversity of citizenship," the widow and children are the real parties in interest (p. xi, *infra*).

Decisions of this Court are plainly to the contrary. It was early made clear that the Federal Employers' Liability Act creates a cause of action for the administrator, not for the widow and children, that the administrator is the real party in interest, and that only the administrator can sue. *American R. R. Co.* v. *Birch*, 224 U.S. 547 (1912); *Missouri-K.-T. R. Co.* v. *Lenahan*, 39 Okla. 283, 135 Pac. 383 (1913); *Marshall* v. *New York Cent. R. Co.*, 218 F.2d 900, 906 (7th Cir., 1955). And this Court, astute as it always is to scrutinize closely claims of federal jurisdiction, has looked to the citizenship of a plaintiff administrator, where he is the real party in interest, not only to defeat diversity jurisdiction, *Mecom* v. *Fitzsimmons Drilling Co.*, 284 U.S. 183 (1931), but also to create diversity jurisdiction, *Memphis St. R. Co.* v. *Moore*, 243 U.S. 299 (1917).

The administrator has complete control of a death action under FELA. He determines where and how suit is to be brought, he has the right to settle the claim, he collects the proceeds and is responsible for their proper distribution to the next-of-kin. In the present case the duly appointed administrator is an Oklahoma resident, and not unnaturally chose to sue in the most convenient court

available to him, the court of his own home town. The complaint of the railroad really is that they would have preferred to have someone else, somewhere else, appointed administrator. But that is a decision of the widow which neither the railroad nor, in this action, the Oklahoma courts is free to challenge. As this Court said in *Mecom* v. *Fitzsimmons Drilling Co.*, 284 U.S. 183, 190 (1931):

> "(I)t is clear that the motive or purpose that actuated any or all of these parties in procuring a lawful and valid appointment is immaterial upon the question of identity or diversity of citizenship. To go behind the decree of the probate court would be collaterally to attack it not for lack of jurisdiction of the subject matter or absence of jurisdictional facts, but to inquire into purposes and motives of the parties before that court when, confessedly, they practiced no fraud upon it * * *.
>
> "The case comes to no more than this: There being, under Oklahoma law, a right to have a nonresident appointed administrator, the parties in interest lawfully applied to an Oklahoma court, and petitioner was appointed administrator, with the result that the cause of action for the wrongful death of the decedent vested in him. His citizenship being the same as that of one of the defendants there was no right of removal to the federal court; and it is immaterial that the motive for obtaining his appointment and qualification was that he might thus be clothed with a right to institute an action which could not be so removed on the ground of diversity of citizenship."

In the case just discussed the citizenship of an administrator appointed by the Oklahoma Probate Court was held enough to prevent an action from being removed from the Oklahoma state courts for diversity of citizenship. By the

same token it is enough to prevent the action from being dismissed by the Oklahoma state courts for *forum non conveniens.*

(5) *Defendant's tracks in the state.* Commentators have been agreed that under the usual *forum non conveniens* approach it would be an abuse of discretion to refuse to hear a suit brought in the state where defendant has his actual domicile. Barrett, *The Doctrine of Forum Non Conveniens,* 35 Cal. L. Rev. 380, 419 (1947); Dainow, *The Inappropriate Forum,* 29 Ill. L. Rev. 867, 883 (1935); Braucher, *The Inconvenient Federal Forum,* 60 Harv. L. Rep. 908, 917 (1947); Comment, *Factors of Choice for Venue Transfer,* under 28 U.S.C., Sec. 1404(a), 41 Cal. L. Rev. 507, 509-510 (1953). For a holding to this effect see, *e.g., Vigil Cayuga Const. Corp.,* 185 Misc. 675, 54 N.Y.S.2d 94 (1945), *affirmed,* 269 App. Div. 934, 58 N.Y.S.2d 343 (1945).

Where is a corporate defendant actually domiciled, for purposes of *forum non conveniens?* It has been held that the state of incorporation is not necessarily the domicile for this purpose. *Gore* v. *United States Steel Corp.,* 15 N.J. 301, 104 A.2d 670 (1954). A reasonable answer would be that a railroad is domiciled wherever its tracks run. This would permit it to be sued in the states where it is actively engaged, where it has claim agents and lawyers on an annual retainer, but would permit dismissal of suits brought in some far-off state where the railroad has nothing more than a ticket agent. This is the approach taken by the Arkansas Supreme Court, which holds that for purposes of *forum non conveniens* a railroad with lines across that state has "become in all essential respects a domestic corpora-

tion." *Yockey* v. *St. Louis-San Francisco Ry. Co.*, 183 Ark. 601, 37 S.W.2d 694, 695 (1931). It is prescisely the distinction made by this Court in *Denver & R. G. W. R. Co.* v. *Terte*, 284 U.S. 284 (1931), holding that suit under FELA for injuries inflicted elsewhere could be brought against a railroad which had tracks in the state of the forum but must be dismissed as against another railroad with only offices and soliciting agents in that state. See also *Baltimore & O. R. Co.* v. *Kepner*, 314 U.S. 44, 51 (1941)—the continuing authoritativeness of which was reaffirmed in *Pope* v. *Atlantic Coast Line R. Co.*, 345 U.S. 379 (1953)—where this Court said

> "* * * the disadvantages of litigation far from the scene of the accident are not substantial enough to justify a state court in forbidding the continuation of litigation in a district where the lines of the carrier run."

The reason for such a distinction was explained by Wade, J., concurring in *Mooney* v. *Denver & R. G. W. R. Co.*, 118 Utah 507, 221 P.2d 628, 651 (1950):

> "Though the defendant is a foreign corporation that fact is entitled to little weight on whether this action should be dismissed. Defendant operates an extensive railroad system within this state and is a heavy taxpayer here and so it should be entitled to use of our courts. If it is entitled to use our courts for its own litigation, is the fact that it is incorporated in another state a reason why others should not be able to sue it here?"

The decision below, refusing to allow the railroad to be sued in Oklahoma though it has extensive lines there, con-

flicts with the cited decisions of this Court and of New York, Arkansas, and Utah Courts.

(6) *Suit in adjoining state.* The law is largely made of differences in degree. And there is a difference in degree, though one which the Oklahoma Supreme Court has failed to recognize, between suit in California about a New Hampshire accident, and suit in Oklahoma about a New Mexico accident. The distinction was stated by Chief Justice Dell, concurring in *Johnson* v. *Chicago, B. & Q. R. Co.*, 243 Minn. 58, 66 N.W.2d 763, 777 (1954):

> "In order to avoid confusion and to afford employees under the act a reasonable choice of venue, causes of action which arise in an adjoining state or where the employee lives in an adjoining state, in my judgment, should be triable in this state at the option of the employee. To hold otherwise, in my opinion, would unduly restrict employees under the act and give to trial courts a discretion which I do not think they should have."

The opinion for the Court indicated acceptance of this view. *Id.* at 776. Among many cases in which courts have emphasized that the action arose, or the parties lived, in an adjoining state, and have refused dismissal though other ties with the forum were nonexistent, include: *Kantakevich* v. *Delaware, L. & W. R. Co.*, 13 N.J. Misc. 77, 10 A.2d 651 (1940); *McRanie* v. *Palmer*, 2 F.R.D. 479, 482 (D. Mass. 1942); *Thistle* v. *Halstead*, 95 N.H. 87, 58 A.2d 503 (1948); *Tri-State Transit Co. of La.* v. *Mondy*, 194 Miss. 714, 12 So.2d 920 (1943); *Quigley Co., Inc.* v. *Asbestos Limited, Inc.*, 134 N.J. Eq. 312, 35 A.2d 432 (1944).

We do not contend that this factor should be conclusive. But we do contend that the trial court properly gave

weight to it, and that the decision of the Oklahoma Supreme Court conflicts with the other decisions here cited in totally ignoring this factor.

(7) *Trial court's determination.* A final issue, presented by this case, and important in formulating a proper rule to govern application of *forum non conveniens* in FELA cases, is the weight which should be given to the determination by the trial court. Here an experienced trial judge denied the motion to dismiss on the ground of *forum non conveniens*, giving detailed reasons for his action (R. 89-90). But so far as is indicated by the opinion of the Oklahoma Supreme Court, that court gave no weight whatever to the trial judge's determination, but approached the matter *de novo*.

We have been told by this Court that "the doctrine leaves much to the discretion of the court to which plaintiff resorts," and that plaintiff's choice "should rarely be disturbed." *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508 (1947). Is not the fact that the court to which plaintiff resorted, in a fair exercise of its discretion, determined not to dismiss the action almost conclusive assurance that this is not one of those rare cases in which dismissal should be granted? Perhaps a trial judge will occasionally err, but unrestricted review by appellate courts, with its inevitable invitation to every railroad, unsuccessful below, to repeat its attack in the appellate court, is too high a price to pay to avoid the truly exceptional case where a trial court retains one of those rare cases which it should have dismissed.

Of course it is not for this Court to say when mandamus is available under Oklahoma procedure. But it is for this Court to announce that the effective preservation

of federally-created rights requires that great deference be paid the decision by the trial judge. On many other issues involved in FELA cases, this Court has done just that. Thus the states are free to follow their own procedures as to how and when the losing defendant may seek review of a refusal to direct a verdict—but this Court has insisted that a uniform federal standard governs the state courts' decisions of such questions, and has emphasized the heavy weight which must be given to the verdict of the jury in FELA actions, no matter what the state may do in purely state cases. *E.g., Tennant* v. *Peoria & P.U.R. Co.*, 321 U.S. 29 (1944); *Lavender* v. *Kurn*, 321 U.S. 645, 653 (1946). The Court can and should enjoin a similar restraint upon the state appellate courts in reviewing both grants and denials of motions to dismiss on the ground of *forum non conveniens*.

Circuit Judge Goodrich was talking about transfers from district to district in federal courts under 28 U.S.C., Sec. 1404(a), but the substance of his discussion in *All States Freight, Inc.* v. *Modarelli*, 196 F.2d 1010, 1011-1012 (3rd Cir., 1952), applies as well to the questions about state appellate courts here presented.

> "The second danger which threatens the usefulness of Section 1404(a) comes from the appellate courts. It is settled in this Circuit and elsewhere that an order either making a transfer or refusing a transfer is not appealable. Now the effort is being made both in this court and elsewhere to substitute for appeal a review by mandamus whenever the losing part on a motion to transfer wants an advance review of the ruling on this point.
>
> "We think that this practice will defeat the object of the statute. Instead of making the business of the

courts easier, quicker and less expensive, we now have the merits of the litigation postponed while appellate courts review the question where a case may be tried.

"Every litigant against whom the transfer issue is decided naturally thinks the judge was wrong. It is likely that in some cases an appellate court would think so, too. But the risk of a party being injured either by the granting or refusal of a transfer order is, we think much less than the certainty of harm through delay and additional expenses if these orders are to be subjected to interlocutory review by mandamus * * *.

"* * * (W)e cannot escape the conclusion that it will be highly unfortunate if the result of an attempted procedural improvement is to subject parties to two lawsuits: first, prolonged litigation to determine the place where a case is to be tried; and, second, the merits of the alleged cause of action itself."

The last century has seen no development in the law more striking than the centralization of power in the hands of appellate courts, with its consequent reduction of the trial judge to a mere hearing examiner and the jury to a ceremonial vestige. Actions under the FELA are almost the only area of the law in which this tendency has been resisted, and here it has required vigilant attention and vigorous action by this Court to preserve the traditional system. See Green, *Jury Trial and Mr. Justice Black*, 65 Yale L. J. 482 (1956). It is for this court to prevent new barriers of delay and expense from being erected to hamper the working man in his attempt to secure the rights Congress gave him by making clear that *forum non conveniens* motions should be passed on by the trial court rather than the appellate court.

CONCLUSION

Reasonable and fair administration of the Federal Employers' Liability Act requires that those states which have chosen to adopt the doctrine of *forum non conveniens* give a common substance to that doctrine, in the interests of predictability and uniformity of treatment. This Court cannot and should not review every case in which a state court orders dismissal of a FELA action on these grounds, but the Court can and should review an occasional case in order to delimit and define the proper application of the doctrine. The present case was wrongly decided below, in a manner contrary to decisions of this Court and of courts of other states. But more important, it raises a rich assortment of the kinds of issues which *forum non conveniens* poses in FELA litigation, and thus offers an especially appropriate opportunity for this Court to provide guidance to the courts engaged in day-to-day administration of the Act.

For the foregoing reasons, this petition for a writ of certiorari should be granted

Respectfully submitted,

WILLIAM H. DE PARCQ,
2055 Rand Tower,
Minneapolis, Minnesota,
Attorney for Petitioners.

Of Counsel:

PAT MALLOY,
1910 First National Building,
Tulsa 3, Oklahoma;

CHARLES ALAN WRIGHT,
324 Townes Hall,
Austin 12, Texas.

August, 1956.

APPENDIX

APPENDIX A

PETITION AND ANSWER IN SUPREME COURT OF OKLAHOMA

This application is presented on the part of the petitioner before this court for a writ of mandamus and prohibition against the District Court of Creek County, Oklahoma, and Honorable Kenneth Hughes, Judge of said court, to prevent respondents from further exercising jurisdiction in the case of Joe Moore, Administrator of the Estate of Vernon F. Adair, Deceased, v. The Atchison, Topeka and Santa Fe Railway Company Cause No. 29933 in the District Court of Creek County, Oklahoma, for the reason and upon the grounds that said court is an inappropriate and inconvenient forum for the trial of said transitory action.

The petitioner herein filed a verified motion to dismiss in this case upon the doctrine of *forum non conveniens* in August, 1955. The motion came on for hearing on the 28th day of November, 1955, and was overruled on this date by the Honorable Kenneth Hughes, Judge of said court, to which ruling the petitioner excepted. Petitioner at that time gave notice in open court of its intent to file this application and orally moved the trial court to stay further proceedings pending the filing of this application. The trial court thereupon entered its order staying further proceedings for a period of fifteen days in order to allow petitioner to file this application with this court.

Statement of Facts

This action arises out of an alleged accident and injury resulting in death occurring in the State of New Mexico and brought under the Federal Employers' Liability Act, Title 45, U.S.C.A., Section 51, *et seq.* At the time of the alleged accident the decedent, Vernon F. Adair, resided in

the City of Clovis, State of New Mexico, together with his wife and children.

The motion to dismiss on file in the District Court of Creek County, Oklahoma is verified and alleges and states that the real parties in interest in said action are the surviving wife and children of the deceased, all of whom are residents of the State of New Mexico and that the petition filed by the plaintiff administrator shows on its face that such non-residents are the real parties in interest and that this suit is brought for their benefit. The verified motion to dismiss further states that the deceased, Vernon F. Adair, at the time of his death was a bona fide resident of Clovis, New Mexico and that the petitioner is amenable to service of process in both state and federal courts in New Mexico, including adequate courts in Clovis, Albuquerque, Roswell, Fort Sumner, Santa Fe, Portales, Las Vegas, Los Lunas and other towns and cities, and that these courts afford the plaintiff prompt hearing and determination of his claim. The motion further shows that all witnesses having knowledge concerning the alleged accident and plaintiff's decedent's death and the manner and place of its occurrence reside and have their homes and familes in New Mexico; and further that the trial of this action in the District Court of Creek County, Oklahoma would require the attendance of the witnesses at a place over 600 miles from their places of work, homes and offices for a period of from five to seven days each. Petitioner further set forth in its motion the names and addresses of fifteen witnesses residing in New Mexico, which counsel expects to make available at the trial, if the defendant is forced to trial, and introduce them on behalf of the defense, depending upon the evidentiary developments. Further, if the trial is held in the District Court of Creek County, Oklahoma, it would require the petitioner to incur additional expenses in said case in the approximate amount of $5,000.00 in excess of the cost of trial in New Mexico. The motion further shows that the filing and trial of the action in said court and of similar ac-

tions has caused a material increase in the work of the judges of said court and in the office of the clerk of said court, and has materially increased the expense of maintenance of court, and if such actions are allowed to be filed at the will of non-resident real parties in interest they will constitute a burden upon said inferior court and will congest the docket of said court to such an extent that the trial of other cases, which are rightfully filed herein by parties having their bona fide residence within the State of Oklahoma, will be delayed to the detriment of the parties thereto; that other litigants will suffer injury as a result of the filing and trial of transitory actions in said court.

The verified motion to dismiss in this case, together with all documents filed therein, together with the orders thereon, are contained in the certified transcript marked "Exhibit A", attached hereto and made a part hereof.

Said case is not yet at issue but the lower court has entered its order requiring petitioner to file its answer on or before fifteen days from the 28th day of November, 1955. Unless this court issues a writ prohibiting said lower court from trying said case until this court can pass upon this application, petitioner will suffer all of the irreparable inconveniences, burdens and expenses necessarily incurred by trial of said case in said court. Therefore, this court should issue a writ of prohibition prohibiting said lower court from trying said case until after this court has determined this application for a writ of mandamus.

Petitioner further alleges that said lower court, in overruling said motion to dismiss, not only abused its discretion, but acted arbitrarily and in disregard of the opinions of this court and that said motions should have been sustained.

Petitioner further shows that if it is required to try said case in said lower court it will thereby suffer and incur all of the said additional unnecessary and unwarranted inconveniences, expenses and burdens, and will have no

adequate remedy, and that said question will then be moot for the reason that this court has already held that an appeal by petitioner is not an adequate remedy.

Therefore, petitioner has no remedy save by a writ of mandamus to be issued by this court, commanding said lower court to dismiss said action.

Petitioner says that this Honorable Court should assume original jurisdiction in an original proceeding under its constitutional superintending control of inferior courts and use such rights and orders as may be appropriate and necessary.

WHEREFORE, petitioner prays:

1. That this Honorable Court assume original jurisdiction of this proceeding.

2. That it forthwith issue a writ of prohibition to the District Court of Creek County, Oklahoma, and the judge thereof, prohibiting and staying a trial of said action until this court shall have determined this application for writ of mandamus.

3. That upon a hearing hereof this Honorable Court issue a writ of mandamus to the District Court of Creek County, Oklahoma, and the judge thereof, commanding that petitioner's motion to dismiss in said action be sustained and said action dismissed.

4. For such other orders, writs and relief to which petitioner may be entitled.

RAINEY, FLYNN, GREEN & ANDERSON
By G. F. Rainey
735 First National Building
Oklahoma City, Oklahoma,
and
Charles E. Daniel,
Drumright, Okla.,
Attorneys for Petitioner.

[APPENDIX A]

ANSWER AND RESPONSE TO PETITIONER'S APPLICATION

Come now the respondents, District Court of Creek County, Oklahoma, and Honorable Kenneth Hughes, the judge thereof, and for answer and response to petitioner's application for original jurisdiction, writ of mandamus, and writ of prohibition, allege and state:

I.

That petitioner's application arises out of ruling of respondents on petitioner's motion to dismiss in case of Joe Moore, the administrator of the estate of Vernon F. Adair, Deceased, *vs.* The Atchison, Topeka and Santa Fe Railway Company, Cause No. 29933 in the District Court of Creek County, Oklahoma.

That the hearing on said motion was held on the 28th day of November, 1955.

That upon the conclusion of said hearing the court found:

(a) That the action, a death action, was brought under the Federal Employers' Liability Act, Title 45, U.S. C.A., Sec. 41, *et seq.*

(b) That under Sec. 59 of said Title 45 the real party in interest in said cause is the personal representative of the deceased.

(c) That the plaintiff in said Cause No. 29933 is one Joe Moore, the legally appointed personal representative of Vernon F. Adair, deceased; that said Joe Moore is a bona fide, legal resident of said Creek County, Oklahoma.

(d) That the jury docket of Creek County, Oklahoma, are current, and that the filing and trial of said Cause No. 29933 could not constitute inconvenience to the court or local litigants or attorneys of said county.

Finally, the court, in the exercise of its judicial discretion, found that petitioner had not made adequate showing of inconvenience to warrant the dismissal of said Cause No. 29933 on the grounds of inconvenient forum.

II.

For further answer respondents state that both the motion to dismiss and the affidavit in opposition thereto reveal that the deceased, Vernon F. Adair, was killed while riding on a train owned by and operated by petitioner, which said train collided headon with a second train also owned and operated by petitioner. That as a result of said collision said Vernon F. Adair was instantly killed.

That although petitioner listed some fifteen non-resident witnesses, which petitioner alleged in its motion to dismiss would be required to testify at the trial, petitioner did not state in detail, or even in substance, what said witnesses would or could testify to in the way of defense to said action.

That in said motion to dismiss petitioner further alleged that if the case were tried in Creek County, Oklahoma, petitioner would incur additional expense in defending said action in the approximate sum of $5,000.00; that, however, petitioner totally failed to make any showing as to how said figure, or any part thereof, was arrived at in calculating said alleged additional expense.

That due to the fact, as revealed by said verified motion to dismiss and affidavit in opposition thereto, that said deceased, Vernon F. Adair, was instantly killed no medical testimony, or testimony with respect to conscious pain and suffering, would be or could be required in the prosecution or defense of said action.

III.

For further answer and response respondents specifically deny, as alleged in petitioner's application herein, that

the trial court abused its discretion or acted arbitrarily and in disregard of the opinions of the Supreme Court of Oklahoma; but, on the contrary, state that after a full and complete hearing, and in line with the opinions of the Supreme Court of Oklahoma, and in the exercise of its discretionary powers, clearly delegated to the trial court by the Supreme Court opinions, found that petitioner, although pleading inconvenience throughout its motion to dismiss, failed to make any *prima facie* showing in support of said inconvenience claims.

Wherefore, respondents pray that this Honorable Court refuse to assume original jurisdiction in this proceeding, and that it deny petitioner's request for a writ of prohibition and application for writ of mandamus.

PAT MALLOY,
Attorney for Respondents.

APPENDIX B

OPINION AND JUDGMENT OF THE SUPREME COURT OF OKLAHOMA

Filed
In Supreme Court
of Oklahoma
April 3, 1956
Andy Payne, Clerk.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Petitioner,

v. No. 37,180

DISTRICT COURT OF CREEK COUNTY, OKLAHOMA, and HONORABLE KENNETH HUGHES, The Judge thereof,

Respondents.

SYLLABUS

An action against a foreign railway company for death of employee in railroad accident in New Mexico should be dismissed under doctrine of *forum non conveniens* where deceased, surviving widow and children of deceased, and all witnesses resided in New Mexico, and only reason why action should be tried in Oklahoma was that plaintiff administrator, who was one of attorneys prosecuting the action resided in Oklahoma.

ORIGINAL PROCEEDING BY ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY to obtain Writ of Mandamus directed toward District Court of Creek County, Oklahoma.

WRIT GRANTED

Rainey, Flynn, Green & Anderson,
Oklahoma City, Oklahoma, and
Charles E. Daniel,
Drumright, Oklahoma, for Petitioner;

Pat Malloy,
Tulsa, Oklahoma, and For Respondent.
Charles Alan Wright,
Austin, Texas,
of Counsel.

WILLIAMS, V. C. J.:

This is an original proceeding in this Court by The Atchison, Topeka and Santa Fe Railway Company, as petitioner, to prohibit the District Court of Creek County, Oklahoma, and Kenneth Hughes, as Judge of said court, from proceeding in the case of Moore, administrator, v. Atchison, Topeka and Santa Fe Railway Company, No. 29933 in said court on the ground that said court is an inappropriate and inconvenient forum for the trial of the case.

On July 5, 1955, Vernon F. Adair was killed in a train wreck which occurred near Cardinnias, New Mexico. At the time of his death, Adair was a resident of Clovis, New Mexico, and was survived by his wife and seven minor children, all of whom live in Clovis, New Mexico. On July 18, 1955, just thirteen days later, Mr. Joe Moore, an attorney in Creek County, Oklahoma, was appointed administrator of the estate of Vernon F. Adair, deceased, by the County Court of Creek County, Oklahoma. On the same day the above mentioned action was instituted by Mr. Moore as such administrator in the District Court of Creek County, Oklahoma. The attorneys of record for the plaintiff in that case, in addition to Mr. Moore himself, were Mr. William H. DeParcq, of Minneapolis, Minnesota, and Mr. Pat Malloy, of Tulsa, Oklahoma. In addition, Mr. Charles Allan Wright, of Austin, Texas, has apparently become subsequently associated as counsel for plaintiff.

After the filing of the action in district court, defendant railway company filed its motion to dismiss the action upon the principle of *forum non conveniens*. The district

court overruled such motion and this proceeding was thereafter instituted.

The action which petitioner seeks to have dismissed is a wrongful death action brought by the plaintiff administrator for the benefit of the surviving widow and children of the deceased, Vernon F. Adair, under the provisions of the Federal Employers' Liability Act, 45 U.S.C.A., § 51 *et seq.* With the possible exception of the factor of the plaintiff administrator's residence within this state, the case is a prime example of the type of case to which the doctrine of *forum non conveniens* should be applied. The decedent was a resident of the State of New Mexico. The wreck in which he lost his life occurred in the State of New Mexico. The surviving widow and children for whose benefit the action is brought reside in New Mexico. Every known witness to possibly be called upon to testify in the case resides in New Mexico. The defendant railway company is a Kansas Corporation, but has lines in New Mexico and is amenable to service of process in both state and federal courts in that state. The cost of defending the action in Oklahoma would exceed the cost of defending the same in New Mexico by an estimated $5,000. The circumstances of the case would seem to be even more compelling toward the application of *forum non conveniens* than were those involved in the case of *Murphey* v. *St. Louis-San Francisco Railway Company* which this court ordered dismissed in *St. Louis-San Francisco Railway Company* v. *Superior Court, Creek County* (Okl.), 290 P. 2nd 118.

The Plaintiff in the action is unable to suggest any valid reason why the action should be tried in this jurisdiction, but insists that he, as the administrator, is the real party in interest and is a resident of this state and therefore has an absolute right to bring the action in this jurisdiction and that the same cannot be dismissed. We do not agree.

Plaintiff cites as his authority for such contention the line of cases announcing the rule followed for the purpose

of ascertaining the jurisdiction of such courts, such as *Mecom* v. *Fitzsimmons Drilling Co.*, 284 U.S. 183, and *Memphis St. R. Co.* v. *Moore*, 243 U.S. 299. Such cases deal solely with a strict determination of jurisdiction of the court and have nothing to do with the determination of the appropriateness of the forum selected. We are not here concerned with a question of jurisdiction or venue. It is conceded that both jurisdiction and venue exist. The question of *forum non conveniens* does not even arise unless the court has jurisdiction and venue. For a complete discussion of this point see *St. Louis-San Francisco Ry. Co.* v. *Superior Court* (Okl.), 276 P. 2d 773. For a discussion and review of the authorities dealing with the question of determining the real party in interest for purpose other than a strict determination of jurisdiction based on diversity of citizenship see *Fenton* v. *Sinclair Refining Company* (Okla.), 283 P. 2d 799, wherein we held that the widow and children of the deceased whose death gave rise to the cause of action were the real parties in interest rather than the non-resident administrator of decedent's estate, for the purpose of determining the applicable statute of limitations.

The reported case most nearly analogous to the case here in question that we have been able to discover *in* that of *Giles* v. *Western Air Lines, Inc.*, 73 F. Supp. 616. In that case the decedent had been a resident of California. The surviving widow was a resident of California, as were all the witnesses. The defendant corporation was a citizen of Delaware with its main office in California, but had an agent upon whom service of process could be had in the State of Minnesota. A resident of Minnesota was appointed administratrix of decedent's estate by a probate court in Minnesota. Such administratrix then brought the action in a United States District Court in Minnesota. Jurisdiction of the Court existed on the basis of diversity of citizen-

ship. The court dismissed the action on the grounds of *forum non conveniens*, and in doing so said in its opinion:

> "Plaintiff is unable to suggest any reason why the action should be tried in this jurisdiction, except that the plaintiff administratrix, an employee of the attorney who commenced the action, resides here. Obviously, the administratrix has no interest in the outcome of this lawsuit. Her appointment as special administratrix by the Probate Court of this county is admitted. She merely enters the case as a means whereby her employer, the attorney for the heirs and beneficiaries, could, for his own convenience, institute the action in this jurisdiction. She is merely the nominal plaintiff. Her residence in this District should have no weight on the scale which the Court must examine as to the equities which are presented on this motion and upon which it must exercise its discretion. At the most, it would seem that her residence is a factor of relatively little consequence. Every other factor, circumstance, and convenience is to be found in support of the application of the doctrine. No prejudice is made to appear if the heirs and beneficiaries of the deceased are required to try their lawsuit in the forum where the accident happened, where they reside, and where all the witnesses reside * * *.
>
> "Weighing all the factors which should guide the Court's discretion, it seems clear that the showing made herein implies the view that this is one of the 'rare cases' in which the doctrine should be applied. There is a complete absence of any satisfactory showing which substantiates the contention that the interest of the heirs at law and beneficiaries of the deceased justifies this Court in retaining this case in the Federal Court in this State, some two thousand miles from where the accident happened, where all the interested parties reside, and where all of the witnesses reside.

If the doctrine of *forum non conveniens* is ever applicable in Federal Court and the case of *Gulf Oil Corporation* v. *Gilbert* now makes it clear that, under the Federal rule, it is applicable, it must be recognized that the showing herein justifies, it not requires the dismissal of plaintiff's complaint and the remitting of the heirs and beneficiaries to courts of their own State. It would be an abuse of discretion to hold otherwise."

The principal difference between the cited case and the one here involved is that in that case the administratrix was an employee of one of the attorneys in the case, whereas here the administrator is himself one of the attorneys in the case. We fail to see how such difference could possibly have any material effect upon the outcome, however.

It should be apparent from a reading of the previous opinions of this and other courts that the principal purpose of the adoption of the doctrine of *forum non conveniens* was to attempt to stop the wholesale indiscriminate importation of foreign causes of action into this jurisdiction. If this court were to hold that the application of the doctrine could be avoided in death cases by the simple expedient of procuring the appointment of a resident administrator to bring the action, we would in effect be opening wide the doors of the courts of this state and extending an invitation to prospective litigants everywhere to bring their litigation here without fear of dismissal, and the doctrine of *forum non conveniens* would thereby be rendered completely ineffective. This we decline to do.

Other contentions are advanced by respondent and plaintiff below which we find it unnecessary to consider here since they have all been passed upon in our previous opinions in *St. Louis-San Francisco Ry. Co.* v. *Superior Court* (Okl.), 276 P. 2d 773 and 290 P. 2d 118, and *Missouri-Kansas-Texas R. Co.* v. *District Court of Creek County* (Okl.), — P. 2d —.

[APPENDIX B]

It is alleged by petitioner, and not denied, that after petitioner's motion to dismiss was filed in the case, in district court, plaintiff filed the same case, styled Joe Moore, Administrator of the Estate of Vernon F. Adair, deceased v. Atchison, Topeka and Santa Fe Railway Company, No. 55C7199, in the Circuit Court of Cook County, Illinois. It therefore appears that the same case is now pending in both Creek County, Oklahoma, and Cook County, Illinois, involving a cause of action which arose in New Mexico, the witnesses and interested parties to which reside in New Mexico. It would seem that the term "transitory cause of action" is even more appropriate than usual when applied to this case. We hold that the case filed in the District Court of Creek County should be dismissed on the grounds of *forum non conveniens* and that the failure of respondent to dismiss the same under the facts and circumstances of this case constituted an abuse of discretion.

The application of writ of mandamus directing respondent to dismiss case No. 29933 therein, entitled Joe Moore, administrator v. Atchison, Topeka & Santa Fe Railway Company, is hereby granted.

Johnson, C. J., and Halley, Jackson and Hunt, JJ: concur; Blackbird, J. Dissents.

Filed
In Supreme Court
of Oklahoma
May 22, 1956.
Andy Payne, Clerk.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

May 22, 1956.

THE CLERK IS HEREBY DIRECTED TO ENTER THE FOLLOWING ORDERS:

* * * * * * * * * *

ORDERS—5-22-56.
Page -2-

* * * * * * * * * *

37,180—The Atchison, Topeka & Santa Fe Ry. Co. v. The District Court of Creek Co., Okla. Petition for rehearing denied.

* * * * * * * * * *

N. B. Johnson,
Chief Justice.

ATTEST:
ANDY PAYNE: CLERK.

Filed
in Supreme Court
of Oklahoma
June 18, 1956
Andy Payne, Clerk

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Petitioner,	)	
v.	)	No. 37180
DISTRICT COURT OF CREEK COUNTY, OKLAHOMA, and HONORABLE KENNETH HUGHES, the Judge thereof, Respondents.	)	

ORDER ISSUING MANDATE BUT STAYING THE ENFORCEMENT THEREOF

On this 18 day of June, 1956, for good cause shown the mandate of this Court herein is ordered issued, but any enforcement of the mandate in the trial court is hereby ordered stayed until August 22, 1956, pending the filing of a petition for writ of certiorari by the plaintiff in error

in the Supreme Court of the United States, and if such petition is filed on or before said August 22, 1956, enforcement of the mandate shall be further stayed until such time as the Supreme Court of the United States renders a final decision herein, or until further order of this Court.

It is further ordered that the nature of the judgment herein is such as not to require the filing of a supersedeas or stay bond on the part of the plaintiffs in error.

N. B. Johnson,
Chief Justice.

30/31

FILED
SEP 11 1956
JOHN T. FEY, Clerk

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 329

DISTRICT COURT OF CREEK COUNTY, OKLAHOMA, and HONORABLE KENNETH HUGHES, the Judge Thereof,
Petitioners,

VERSUS

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Respondent.

RESPONDENT'S REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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September, 1956.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 5-8780

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I.

OPINION BELOW

The opinion of the Supreme Court of Oklahoma sought to be reviewed is reported in — Okla. —, 298 P.2d 427. That opinion was entered on April 3, 1956, and the petition for rehearing was denied on May 22, 1956.

II.

JURISDICTION

Apparently, petitioner seeks to invoke the jurisdiction of this Court by contending that the reported case involves a question of the denial by the Supreme Court of

Oklahoma of petitioners' "title, right, privilege or immunity * * * claimed under the constitution, treaties or statutes of * * * the United States." 28 U.S.C., Section 1257(3).

Petitioners' first contention is that this Court should set up a single "federal standard" to be followed by all state courts in applying the doctrine of *forum non conveniens*.

It is further contended that this Court should blueprint and set out in detail under what specific circumstances a state court may dismiss a Federal Employers' Liability Act action on the ground of *forum non conveniens* and finally petitioners contend that it was improper for the Supreme Court of Oklahoma to overrule the trial court where the nominal party plaintiff (being one of the attorneys for himself) was a resident of the forum state.

III.

QUESTIONS PRESENTED

(1) Should this Court set up a binding single standard to be followed by all state courts in applying the doctrine of *forum non conveniens*, thereby denying to the state courts the right to exercise any discretion in the matter?

(2) Can a non-resident attorney, representing a non-resident real party in interest, defeat and nullify the doctrine of *forum non conveniens* which has been accepted by the State of Oklahoma through the transparent expediency of joining a resident attorney as co-counsel and arranging for that attorney's appointment as administrator of the estate of the non-resident decedent?

IV.

SUMMARY OF ARGUMENT

Respondent's contention is that the decision of the Supreme Court of Oklahoma is clearly in accord with the decision of this Court in *Missouri ex rel Southern Railway Company* v. *Mayfield* (1950), 340 U.S. 1. In that opinion this Court emphatically pointed out that so long as a state makes no discrimination against Federal Employers' Liability Act suits and makes no discrimination against citizens of other states, it is free to accept or reject the doctrine of *forum non conveniens*. In the same case this Court held that if a state chose to accept the doctrine it was then free to enforce the same according to its own local law. Under such circumstances, this Court held that once a state has chosen to accept or reject the doctrine, the question then becomes one of state law which is not open to review by this Court.

In its prior opinion in the case of *St. Louis-San Francisco Railway Company* v. *Superior Court, Creek County* (Okla., 1954), — Okla. —, 290 P.2d 118, the Supreme Court of Oklahoma, in accepting and enforcing the doctrine of *forum non conveniens*, made it abundantly clear that in so doing, Oklahoma was not, and had no intention of, discriminating against non-residents. In fact, the Supreme Court of Oklahoma in that decision went further by holding that even if the plaintiff in that action had been a citizen and resident of Oklahoma, that fact alone would not convert Oklahoma into an appropriate and convenient forum. We invite this Court's attention to the following

excerpt from the opinion in *St. Louis-San Francisco Railway Company* v. *Superior Court, Creek County, supra*:

> "Nor does the fact that plaintiff Murphey, since the institution of this action, has become a citizen and resident of this state (if in fact he has) convert this state into an appropriate and convenient forum. *Mich. C. R. Co.* v. *Mix*, 278 U.S. 492, 49 Sup. Ct. 207; *Giles* v. *Western Airlines*, 73 F. Supp. 616."

Having announced the foregoing rule in its opinion on the subject of *forum non conveniens*, the present petitioners could hardly expect the Supreme Court of Oklahoma to do a complete about face and allow the doctrine to be nullified and mocked by a legalistic slight of hand performance whereby the appointment of a Creek County, Oklahoma, attorney as administrator of the estate of a deceased resident and citizen of New Mexico is engineered by an attorney residing and practising in Minnesota.

V.

ARGUMENT

The cause of action in this case arose on July 5, 1955, when Vernon F. Adair, employed by defendant as a head brakeman, was killed in a train wreck in New Mexico. At the time of his death Adair was a citizen of New Mexico, residing at Clovis, New Mexico. He was survived by his wife and minor children, all of whom lived in Clovis, New Mexico. On July 18, 1955, just thirteen days after the fatal accident, Mr. Joe Moore, an attorney of Creek County, Oklahoma, was appointed administrator of Adair's estate

by the County Court of Creek County, Oklahoma. On the same day this case was filed by the said Joe Moore as such administrator in the District Court of Creek County, Oklahoma. The attorneys of record for the plaintiff were, in addition to Mr. Moore himself, Mr. William H. De Parcq of Minneapolis, Minnesota, and Mr. Pat Malloy of Tulsa, Oklahoma. A Mr. Charles Alan Wright of Austin, Texas, also appeared on the brief for plaintiff when the defendant railway company applied to the Supreme Court of Oklahoma for a writ of mandamus against the District Court of Creek County.

The trial court overruled a motion to dismiss on the ground of *forum non conveniens* and thereupon this respondent filed its application with the Supreme Court of Oklahoma, praying that Court to assume original jurisdiction and to grant a writ of mandamus requiring the District Court of Creek County to dismiss the action. The Supreme Court of Oklahoma, after reviewing the record made in the trial court and after considering briefs submitted by petitioners and respondent, held that the lower court's refusal to dismiss the action was an abuse of discretion. The writ of mandamus was granted.

In its opinion granting the writ of mandamus the Supreme Court of Oklahoma reviewed its previous decision and pointed out that:

> "The circumstances of the (this) case seem to be even more compelling toward the application of *forum non conveniens* than were those involved in the case of *St. Louis-San Francisco Railway Company* against

Superior Court, Creek County (Okla.), 290 Pac. 2d 118."

In disposing of the present petitioners' contention that Joe Moore was the real party in interest and therefore had an absolute right to bring the action in Oklahoma, the Supreme Court of Oklahoma cited and called particular attention to the reported case of *Giles* v. *Western Air Lines, Inc.*, 73 F. Supp. 616. In that case a Federal Court in Mr. De Parcq's home state of Minnesota refused to allow him to maintain exactly the type of case he sought to prosecute in Oklahoma in the instant case. The printed opinion in *Giles* v. *Western Air Lines, Inc., supra*, reflects that Mr. De Parcq represented the plaintiff in that case just as he does in this one. The Supreme Court of Oklahoma called attention to the fact that the only difference between the *Giles* case, *supra*, and the instant case is that in the *Giles* case plaintiff's attorney engineered the appointment of one of his employees as administratrix, whereas in the case at bar he engineered the appointment of an attorney of Creek County, Oklahoma, as administrator. The record from the Creek County Court shows that Mr. Moore acted throughout in the dual capacity of dummy administrator and local counsel. This method of shopping for venue was very obvious from the record before the Supreme Court of Oklahoma, and in commenting thereon in its opinion in this case, that Court stated:

"The principal difference between the cited case and the one here involved is that in that case the administratrix was an employee of one of the attorneys in the case, whereas here the administrator is himself one

of the attorneys in the case. We fail to see how such difference could possibly have any material effect upon the outcome, however.

"It should be apparent from a reading of the previous opinions of this and other courts that the principal purpose of the adoption of the doctrine of *forum non conveniens* was to attempt to stop the wholesale indiscriminate importation of foreign causes of action into this jurisdiction. If this court were to hold that the application of the doctrine could be avoided in death cases by the simple expedient of procuring the appointment of a resident administrator to bring the action, we would in effect be opening wide the doors of the courts of this state and extending an invitation to prospective litigants everywhere to bring their litigation here without fear of dismissal, and the doctrine of *forum non conveniens* would thereby be rendered completely ineffective. This we decline to do."

In its opinion in this case the Supreme Court of Oklahoma likewise called attention to the fact that after the railway company filed its motion to dismiss in the trial court in Creek County, Oklahoma, the nominal plaintiff, Joe Moore, filed this same action in the Circuit Court of Cook County, Illinois. To our minds this action on the part of the plaintiff and his co-counsel was a tacit admission that in view of the previous decision by the Supreme Court of Oklahoma in *St. Louis-San Francisco Railway Company* v. *Superior Court, Creek County, supra,* this case could not be maintained in Oklahoma.

CONCLUSION

This Court, in *Missouri* v. *Mayfield, supra,* held that a state court "should be free to decide the availability of the principle of *forum non conveniens,* * * * according to its own local law." And, "whether a state makes such a choice is like its acceptance or rejection of the doctrine of *forum non conveniens,* a question of state law not open to review * * *."

The Supreme Court of Oklahoma made its decision to adopt and accept the doctrine when it rendered its opinion on July 13, 1954, in the case of *St. Louis-San Francisco Railway Company* v. *Superior Court, Creek County, supra.* Counsel for petitioners in the instant case were fully cognizant of that decision when, on July 18, 1955, they filed the present case in the same county. In the instant case the Supreme Court of Oklahoma has merely refused to allow the present petitioners to avoid the application of the doctrine "by the simple expedient of procuring the appointment of a resident administrator to bring the action" which "would in effect be opening wide the doors of the courts of this state and extending an invitation to prospective litigants everywhere to bring their litigation here without fear of dismissal * * *."

In ordering a dismissal of this case the action of the Supreme Court of Oklahoma is in accord with the decision of this Court in *Missouri* v. *Mayfield, supra.* Oklahoma has adopted the doctrine of *forum non conveniens* and is therefore free to enforce that doctrine according to its own local law.

It is, therefore, submitted that the question is not open for review by this Court and that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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